

## TIKTOK v. GARLAND AND THE FIRST AMENDMENT ANTICANON

### INTRODUCTION

The story of the modern First Amendment is one of recurring remorse.<sup>1</sup> In the past, the story goes, governments beholden to fear sought to silence their critics in the name of national security, and courts who did not understand the true meaning of free speech allowed it. But we have learned from our mistakes, we tell ourselves. Invariably, First Amendment classes start with the iconic opinions of Justices Holmes and Brandeis that saw what their colleagues could not when, during World War I and the First Red Scare, the government locked people up for their anti-war or pro-Communist political speech—that free speech requires bravery, that “[m]en feared witches and burnt women,”<sup>2</sup> and that “we should be eternally vigilant against attempts to check the expression of opinions that we loathe and

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<sup>1</sup> GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 5 (2004) (“Time and again, Americans have allowed fear and fury to get the better of them . . . and then—later—regretted their actions.”).

<sup>2</sup> *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

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believe to be fraught with death.”<sup>3</sup> And although there have been notable lapses,<sup>4</sup> professors teach students that these celebrated words from *Abrams* and *Whitney* prevailed in the long run and represent the true ethos of the First Amendment. The majority opinions have become part of the anticanon of First Amendment law, and the free speech tradition that emerged in their wake is distinguished by its robustness.

The Court’s per curiam opinion in *TikTok v. Garland*,<sup>5</sup> which upheld the Protecting Americans from Foreign Adversary Controlled Applications Act (PAFACAA) against First Amendment challenge, is a problem for this narrative of progress. It shows that, far from having learned the lessons of the past, the forces that Holmes and Brandeis urged eternal vigilance against are still powerful today. Again, the government claimed that a foreign threat to national security could only be countered by giving it extraordinary power over the public sphere. Again, the Court deferred to these arguments. And again, the Justices’ decision has not survived the test of history.

Only this time, history’s verdict came much faster. Mere days after the Court’s decision in *TikTok*, as PAFACAA entered into force and should have resulted in TikTok going dark in America, the bipartisan chorus that insisted that the platform was an existential national security threat went quiet, and both the outgoing President and his successor refused to enforce the ban. At the time of this writing (now a year after the law formally took effect) the platform continues to operate much as it did, without any of the previous hysteria. The current President has called the national security concerns about the app—the ones that the Supreme Court deferred to—“highly overrated,”<sup>6</sup> and the Court’s opinion in *TikTok* seems to lie forgotten in the U.S. Reports.

The Court’s opinion in *TikTok* cannot be so easily overlooked. The case would be bad enough were it just another shameful example of the Court failing to protect fundamental liberties in the face of broad

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<sup>3</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>4</sup> Geoffrey R. Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CALIF. L. REV. 1387 (2005).

<sup>5</sup> *TikTok Inc. v. Garland*, 604 U.S. 56 (2025).

<sup>6</sup> The Associated Press, *Trump Says He’ll Keep Extending TikTok Shutdown Deadline*, AP (Aug. 22, 2025), <https://apnews.com/article/trump-tiktok-china-extension-deadline-4a66fbd0e485db5b3da83c176f22ad11>.

but amorphous national security claims, regretted in hindsight. But the Court's decision threatens to do continuing harm to the independence of the American public sphere from government influence, both in practice and as precedent.

In practical terms, the platform now operates under the threat that the President could have it banned with the stroke of a pen, a fact that inevitably gives President Trump tremendous ongoing influence over one of the largest speech platforms in the country. There have been years of concern that the government might be able to pressure social media companies into changing how they moderate content on their services,<sup>7</sup> but no previous administration has had a jawbone as powerful as the ability to shut a platform down entirely by simply deciding to enforce existing law. The Court should never have handed the government this sword of Damocles.

In doctrinal terms, *TikTok* threatens to do long-term damage to First Amendment law by creating loopholes in the strong protections that the First Amendment is supposed to provide. The Court's pathway to upholding PAFACAA, and its willingness to blind itself to the intended and actual speech-related impacts of the law, suggest novel and dangerous ways that the government might frame speech regulation without triggering the ordinary searching First Amendment review.

This Article argues that these practical and doctrinal problems with *TikTok* mean the decision cannot and should not be forgotten. Instead, it should be taught and remembered as part of the First Amendment anticanon—as a cautionary tale of what not to do and as an example of how the lessons of the past remain relevant today.

To make this argument, the Article tells the story of *TikTok* in three parts. Part I tells the political story—how it came to be that, as in previous periods, fear of foreign influence over public discourse led to the bipartisan embrace of a deeply problematic law, and how that law then came to be ignored. Part II tells the doctrinal story—how the Court, deferring to claims of national security necessity by the government, affirmed the constitutionality of PAFACAA 9–0. In

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<sup>7</sup> See, e.g., *Murthy v. Missouri*, 603 U.S. 43, 76 (2024) (Alito, J., dissenting) (“This case involves what the District Court termed ‘a far-reaching and widespread censorship campaign’ conducted by high-ranking federal officials against Americans who expressed certain disfavored views about COVID–19 on social media. . . . If the lower courts’ assessment of the voluminous record is correct, this is one of the most important free speech cases to reach this Court in years.”).

upholding the law, the Court struggled to appear as if it was not reneging on the lessons of *Abrams* and *Whitney*, engaging in complex doctrinal gymnastics to move PAFACAA to a different legal neighborhood. As this Part shows, however, by making those doctrinal moves the decision threatens lasting damage to the architecture of First Amendment law. Part III concludes by arguing that *TikTok* should be understood not only as wrong, but as wrong in ways that hold important and recurring lessons. Like other anticanonical First Amendment precedents, it should serve as a warning of how easily First Amendment liberties can be sacrificed in the name of fear. And like the Court's decisions during World War I and the First Red Scare—indeed, like PAFACAA itself—the Court's decision in *TikTok* should be not just left behind but repudiated.

## I. THE POLITICAL STORY

The law upheld by the Court in *TikTok* is a remarkable piece of legislation. Passed with bipartisan support and signed into law by President Biden in April 2024, PAFACAA forbids service providers from continuing to distribute, maintain or update “foreign adversary controlled applications.”<sup>8</sup> Although the law *could* be applied to other platforms in the future following a determination by the President that such other platforms present a significant threat to the national security of the United States,<sup>9</sup> the Act names only one platform as directly and unambiguously subject to its terms: TikTok.

It's worth pausing to reflect on how stunning it is (or should be) that America passed a law with the practical objective of banning such a dominant and vibrant speech platform. Banning social media platforms is a move typically associated with governments not known for their respect for civil liberties. Indeed, as one amicus brief in *TikTok* noted, the list of other countries that have banned TikTok—which includes Afghanistan, India, Iran, Jordan, Kyrgyzstan, Nepal, North Korea, Senegal, Somalia, and Uzbekistan—“should itself be a warning.”<sup>10</sup> This is not a club the United States normally likes to be included in.

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<sup>8</sup> Pub. L. No. 118–50, § 2(a)(1), 138 Stat. 955 (2024).

<sup>9</sup> *Id.* § 2(g)(3).

<sup>10</sup> Brief of the Knight First Amendment Institute at Columbia University et al. as Amici Curiae in Support of Petitioners, *TikTok Inc. v. Garland*, 2024 WL 5264708, at \*11.

The ban is all the more jarring when set against America's cultural self-conception as exceptionally committed to free speech,<sup>11</sup> and its decades-long bipartisan championship of an "internet freedom" agenda that promoted a deregulatory approach to the internet and American-style free speech online.<sup>12</sup> President Bill Clinton once famously laughed off China's rejection of this American vision of the future. The internet had already changed America, he said in 2000, "imagine how much it could change China."<sup>13</sup> Referring to China's attempts to crack down on the internet, he quipped "Good luck! That's sort of like trying to nail Jell-O to the wall."<sup>14</sup>

A quarter of a century later, China has nailed Jell-O to the wall at home with the construction of the Great Firewall. Meanwhile, by enacting PAFACAA, the United States sought to crack down on a *Chinese* platform out of fear that it might *change America*. To be sure, the internet freedom agenda was already under strain before TikTok emerged as a topic of national concern. In 2018, Jack Goldsmith wrote that the "project is failing, and many of its elements lie in tatters."<sup>15</sup> Countries around the world were seeking to domesticate the online public sphere, and America itself started seriously questioning the benefits of a too-open internet after Russian interference in the 2016 presidential election. But it was the extraordinary commercial and cultural success of a foreign-owned platform in the American market that led to the only significant Congressional action with respect to the internet in the last few decades—and it was a regulation aimed not at any general pathologies of the online sphere, but at that foreign platform alone.

On one view, turnabout was simply fair play, given China's restrictions on American speech platforms. As Tim Wu put it, "Some think that it is a tragic mistake for the United States to violate the

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<sup>11</sup> See, e.g., Lee C. Bollinger & Geoffrey R. Stone, *Dialogue*, in *THE FREE SPEECH CENTURY* 254, 4 (Lee C. Bollinger & Geoffrey R. Stone eds., 2018) ("Freedom of speech has become so much more than just a legal principle. It has become a part of the national identity.").

<sup>12</sup> Jack Goldsmith, *The Failure of Internet Freedom*, KNIGHT FIRST AMENDMENT INST. EMERGING THREATS SERIES 2–3 (June 13, 2018), <https://knightcolumbia.org/content/failure-internet-freedom>.

<sup>13</sup> *Clinton's Words on China: Trade Is the Smart Thing*, N.Y. TIMES (Mar. 9, 2000), <https://www.nytimes.com/2000/03/09/world/clinton-s-words-on-china-trade-is-the-smart-thing.html>.

<sup>14</sup> *Id.*

<sup>15</sup> Goldsmith, *supra* note 12.

principles of internet openness that were pioneered in this country. But there is also such a thing as being a sucker.”<sup>16</sup> Historically, “China did it first” has not been a winning or attractive argument in debates about how America should regulate the public sphere. Indeed, sixty years ago Justice Brennan rejected exactly this argument with respect to a law that burdened Americans’ access to materials the government deemed to be Chinese propaganda. “That the governments which originate this propaganda themselves have no equivalent guarantees [of free speech],” he wrote, “only highlights the cherished values of our constitutional framework; it can never justify emulating the practice of restrictive regimes in the name of expediency.”<sup>17</sup>

PAFACAA is a clear rejection of this idea of American exceptionalism and of internet freedom more broadly. It is a heavy-handed intervention: TikTok had to divest itself from its Chinese-based owner ByteDance in order to continue to operate freely in the United States—and because, as the government did not dispute and the Supreme Court later assumed, such a divestiture was not feasible on the timeline specified by the Act, the practical effect was to ban it.<sup>18</sup> Even more extraordinarily, the law was motivated by concerns about the speech disseminated on the platform.

This is not to say that PAFACAA was a response to speech-related concerns alone. From the beginning, the political and legal justifications for banning TikTok rested on two primary arguments. The first was what I will call the “data collection rationale.” Like every social media platform, TikTok collects a large amount of data about its users. Unlike other social media platforms, however, TikTok’s China-based owners might be required under Chinese law to assist the Chinese government with intelligence work, which could include handing over user data to the Chinese government to be used for espionage or blackmail. Supporters of PAFACAA claimed that the ban was necessary to foreclose this risk.

The second justification for the law was what I will call the “content manipulation rationale.” The premise of this rationale is that TikTok’s Chinese ownership could allow China to manipulate the

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<sup>16</sup> Tim Wu, Opinion, *A TikTok Ban Is Overdue*, N.Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/2020/08/18/opinion/tiktok-wechat-ban-trump.html>.

<sup>17</sup> *Lamont v. Postmaster Gen.*, 381 U.S. 301, 310 (1965) (Brennan, J., concurring).

<sup>18</sup> *TikTok Inc. v. Garland*, 604 U.S. 56, 69 (2025) (referring to the law as “an effective ban”).

content that American users see on the platform in ways that undermine U.S. interests. By censoring certain topics from appearing in users' feeds, or promoting others, China might engage in propaganda, misinformation campaigns, or simply sow discord. The ban would remove the opportunity for such information operations. Formally, the government argued that its concerns about content manipulation were agnostic as to any *particular* message or viewpoint that the platform might promote. But this argument depends on an illusory distinction, because content manipulation is only a national security threat if it results in people believing or knowing things that the government does not want them to believe or know. Precisely because this distinction is illusory, as we will see, government actors in fact often slipped into identifying specific topics or viewpoints they were concerned that TikTok might be used to communicate.

The data collection rationale is therefore obviously a stronger basis on which to defend PAFACAA's constitutionality than the content manipulation rationale, given that it does not relate to the speech on the platform. This is why the government ultimately leaned heavily on this rationale before the Supreme Court. But what this Part shows is that throughout the multi-year saga that ultimately led to the enactment of PAFACAA and the *TikTok* decision that followed, the data collection rationale never stood alone—concerns about content on the platform, and its vulnerability to manipulation by China, were ever-present.

TikTok arrived on the social media scene in earnest in the summer of 2018, when ByteDance acquired the short-form video app Musical.ly and merged it with its then nascent app TikTok. Its rise was astronomic—in 2018 TikTok surpassed Facebook, Instagram, Snapchat and YouTube in downloads.<sup>19</sup> By 2021 it overtook Google as the most visited website in the world, and by 2024 it had more than a billion global users.<sup>20</sup> For many years after it became dominant among young users, it was seen by many as just a dance app because of the popularity of viral dance challenges on the platform. But in reality (and unsurprisingly given the centrality and popularity of the app with its users), TikTok has long been so much more: it is

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<sup>19</sup> Sarah Perez, *TikTok Surpassed Facebook, Instagram, Snapchat & YouTube in Downloads Last Month*, TECHCRUNCH (Nov. 2, 2018), <https://techcrunch.com/2018/11/02/tiktok-surpassed-facebook-instagram-snapchat-youtube-in-downloads-last-month>.

<sup>20</sup> EMILY BAKER-WHITE, *EVERY SCREEN ON THE PLANET: THE WAR OVER TIKTOK 2* (2025).

also a key part of how young people experience culture and politics.<sup>21</sup> Dawning awareness of the app's influence led policymakers to have concerns about how the platform might be weaponized by China.

Indeed, PAFACAA was not the first attempt to ban the app. In what is now a historical irony, President Trump attempted to ban TikTok in August 2020 during his first Administration, using his powers under the International Emergency Economic Powers Act and the National Emergencies Act. The details of this chapter of the saga are ably recounted elsewhere.<sup>22</sup> For present purposes what is relevant is that Trump relied on both the data collection and content manipulation rationales to justify his actions. The executive order noted not only the “vast swaths of information” that TikTok collects that could be used “for blackmail, and . . . corporate espionage,” but also alleged that TikTok “censors content that the Chinese Communist Party deems politically sensitive,” and “may also be used for disinformation campaigns.”<sup>23</sup> President Trump himself publicly explained his actions as retaliation for China's handling of the COVID-19 virus.<sup>24</sup> But the move came a few weeks after users on the platform played a prank on the President which contributed to an embarrassingly low turnout at a campaign rally, leading to speculation that this humiliation was the real source of the President's ire.<sup>25</sup> Either way, there is no question that the very first attempt to ban TikTok was precipitated by dissatisfaction with speech on the platform—including, potentially, political protest. Ultimately President Trump's attempt to ban the app was unsuccessful; it was first enjoined in court and then withdrawn by the Biden Administration.<sup>26</sup>

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<sup>21</sup> Kerry Flynn, *TikTok Dominates Media Outlets as News Source for Gen Z*, AXIOS (Feb. 16, 2024), <https://www.axios.com/2024/02/16/tiktok-news-gen-z-social-media>.

<sup>22</sup> For an excellent and detailed summary of President Trump's initial attempt to ban the app and the legal challenges to it, see Anupam Chander, *Trump v. TikTok*, 55 VAND. J. TRANSNAT'L L. 1145 (2022).

<sup>23</sup> See Exec. Order No. 13,942, 85 Fed. Reg. 48637 (Aug. 6, 2020).

<sup>24</sup> Lisa Friedman & Sapna Maheshwari, *How Donald Trump Went from Backing a TikTok Ban to Backing Off*, N.Y. TIMES (Dec. 28, 2024), <https://www.nytimes.com/2024/12/28/us/politics/trump-tik-tok-ban.html>.

<sup>25</sup> See, e.g., Abram Brown, *Is This the Real Reason Why Trump Wants to Ban TikTok?*, FORBES (Aug. 1, 2020), <https://www.forbes.com/sites/abrambrown/2020/08/01/is-this-the-real-reason-why-trump-wants-to-ban-tiktok>; Rebecca Leber, *Could Trump Have Another Reason for Banning TikTok?*, MOTHER JONES (Aug. 1, 2020), <https://www.motherjones.com/politics/2020/08/could-trump-have-another-reason-for-banning-tiktok>. See also Chander, *supra* note 22, at 1149 (suggesting such a connection).

<sup>26</sup> Chander, *supra* note 22, at 1158–61.

The next attempt to ban the app was even more pervaded by content concerns. In 2023, Montana passed a law banning TikTok in the state,<sup>27</sup> citing concerns that China would use the platform to “gather[] information about Montanans,” and that “TikTok fails to remove, and may even promote, dangerous content that directs minors to engage in dangerous activities.”<sup>28</sup> A court enjoined this law also, on First Amendment grounds.<sup>29</sup>

When President Biden assumed office and withdrew President Trump’s executive order, he also issued a new order directing executive agencies to explore options for dealing with the risks created by foreign adversary access to sensitive data.<sup>30</sup> Over the following years, the government and TikTok worked to try to find a solution to address the Executive’s national security concerns, but these negotiations ultimately stalled.<sup>31</sup>

During this period, TikTok continued to face significant public and congressional scrutiny of its data collection and content moderation. Congress hauled TikTok’s CEO before it for five hours of wide-ranging questioning, including about both data security and content manipulation risks.<sup>32</sup> Talk of a ban was in the air.<sup>33</sup> But as one of the co-sponsors of PAFACAA later recounted, the concerns were not pressing enough to prompt Congress to act.<sup>34</sup> The bill that would become PAFACAA “was still dead,” former Representative Mike Gallagher said, “until October 7th. And people started to see a bunch of anti-Semitic content on the platform and our bill had legs again.”<sup>35</sup> Other lawmakers echoed this account—that concerns about

<sup>27</sup> S.B. 419, 68th Leg. (Mont. 2023).

<sup>28</sup> *Id.*

<sup>29</sup> *Alario v. Knudsen*, 704 F. Supp. 3d 1061, 1081 (D. Mont. 2023).

<sup>30</sup> Exec. Order No. 14,034, 86 Fed. Reg. 31423, 31424–25 (June 11, 2021).

<sup>31</sup> Matt Perault, *What Happened to TikTok’s Project Texas?*, LAWFARE (Mar. 20, 2024), <https://www.lawfaremedia.org/article/what-happened-to-tiktok-s-project-texas>.

<sup>32</sup> Dara Kerr, *Lawmakers Grilled TikTok CEO Chew for 5 Hours in a High-Stakes Hearing About the App*, NPR (Mar. 23, 2023), <https://www.npr.org/2023/03/23/1165579717/tiktok-congress-hearing-shou-zi-chew-project-texas>.

<sup>33</sup> Kari Paul & Johana Bhuiyan, *Key Takeaways from TikTok Hearing in Congress—and the Uncertain Road Ahead*, GUARDIAN (Mar. 23, 2023), <https://www.theguardian.com/technology/2023/mar/23/key-takeaways-tiktok-hearing-congress-shou-zi-chew>.

<sup>34</sup> Ken Klippenstein, *TikTok Ban Fueled by Israel, Not China* (Dec. 10, 2024), <https://www.kenklippenstein.com/p/tiktok-ban-fueled-by-israel-not-china> (recording Mike Gallagher saying “It was a three year endeavor, and it failed a hundred times”).

<sup>35</sup> *Id.*

pro-Palestinian content on the platform (likely nothing more than a predictable product of the platform's younger user base<sup>36</sup>) gave the bill political momentum.<sup>37</sup> For example, the bill's co-sponsor Representative Raja Krishnamoorthi credited October 7 as "really open[ing] people's eyes to what's happening on TikTok" and garnering support for the law.<sup>38</sup> Then-Senator Marco Rubio said that China used TikTok "to spread propaganda to Americans, now it's being used to downplay Hamas terrorism" and this was a reason it needed to be shut down.<sup>39</sup> Senator Josh Hawley called Palestine-related content "a crucial test case" of TikTok's power to "radically distort the world-picture that America's young people encounter" and pointed to "the ubiquity of anti-Israel content" on the app as a reason it should be banned.<sup>40</sup> And Senator Mitt Romney explained that, for those that "wonder why there was such overwhelming support for us to shut down potentially TikTok," the "overwhelming" volume of posts about Palestinians on the platform was the answer.<sup>41</sup> Lawmaker after lawmaker credited the amount of pro-Palestinian content on TikTok in the wake of October 7 as a reason the bill to ban it moved forward. Beyond showing specific viewpoint discriminatory motivations, these statements also illustrate that lawmakers often conflated the general content manipulation rationale with concerns about specific content

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<sup>36</sup> Naomi Nix, *TikTok Posts on Israel-Gaza War Are Overwhelmingly Pro-Palestinian*, WASH. POST (Oct. 7, 2025), <https://www.washingtonpost.com/technology/2025/10/07/tiktok-israel-palestine>.

<sup>37</sup> Erin Alberty, *Sen. Romney Links TikTok Ban to Pro-Palestinian Content*, AXIOS (May 6, 2024), <https://www.axios.com/local/salt-lake-city/2024/05/06/senator-romney-antony-blinken-tiktok-ban-israel-palestinian-content>; Sarah Jeong, *Palestine Was the Problem with TikTok*, VERGE (Aug. 19, 2025), <https://www.theverge.com/features/761076/gaza-images-starvation-tiktok-ban>.

<sup>38</sup> Natalie Andrews et al., *TikTok Crackdown Shifts into Overdrive, with Sale or Shutdown on Table*, W.S.J. (Mar. 9, 2024), <https://www.wsj.com/tech/why-the-new-effort-to-ban-tiktok-caught-fire-with-lawmakers-7cd3f980>.

<sup>39</sup> Marco Rubio (@SenMarcoRubio), (Nov. 1, 2023, at 9:22 PT), <https://x.com/SenMarcoRubio/status/1719751867297562865> ("TikTok is a tool China uses to spread propaganda to Americans, now it's being used to downplay Hamas terrorism. TikTok needs to be shut down. Now.").

<sup>40</sup> Josh Hawley, *Letter to Janet Yellen* (Nov. 7, 2023), <https://www.hawley.senate.gov/wp-content/uploads/files/2023-11/Hawley-Letter-to-CFIUS-re-TikTok-and-Israeli-Hamas-Conflict.pdf> (concluding that "the longer this app is allowed to operate in the U.S., the longer its Chinese Communist Party overseers will apparently be able to propagandize Americans.").

<sup>41</sup> Erin Alberty, *Sen. Romney Links TikTok Ban to Pro-Palestinian Content*, AXIOS (May 6, 2024), <https://www.axios.com/local/salt-lake-city/2024/05/06/senator-romney-antony-blinken-tiktok-ban-israel-palestinian-content>.

and beliefs that lawmakers thought were promoted on the platform, whether as a result of Chinese-mandated manipulation or not. As this shows, at the end of the day, the content manipulation rationale was indistinguishable from a concern that people would see things on TikTok that lawmakers didn't want them to.

Legislative concern with the power the platform held over young people's hearts and minds only intensified after TikTok, in an effort to stave off a ban, made a gaping political miscalculation. As the bill was heading toward a vote, the platform pushed a pop-up to its users, telling them to call their congressional representatives to voice their opposition to the law.<sup>42</sup> Users did so in droves, but the strategy backfired. Many members of Congress later described the flood of calls they received as evidence of the app's ability to use "its influence and power to *force* users" to act in certain ways.<sup>43</sup> Once again, general concerns about content manipulation were expressed as anxiety and frustration that the app was leading its users to hold particular views. Thus, while data collection concerns were undoubtedly ever-present in debates over TikTok, it was content manipulation concerns that pushed the bill over the line.

These concerns would not, in the end, lead TikTok to go dark, however. On January 19, as PAFACAA came into force, TikTok went offline briefly for approximately fourteen hours.<sup>44</sup> But then, the Biden Administration changed its tune. After first supporting the passage of the law and then vigorously defending it in court as a critical national security measure—and specifically opposing the President-elect's request for an order staying the law in order to allow him to attempt to negotiate a solution for the fate of the platform once assuming office<sup>45</sup>—the outgoing Administration suddenly sought to bring the app back

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<sup>42</sup> Cristiano Lima-Strong & Drew Harwell, *TikTok Users Flood Congress with Calls as Potential Ban Advances in House*, WASH. POST (Mar. 7, 2024), <https://www.washingtonpost.com/technology/2024/03/07/tiktok-ban-congress-calls-us>.

<sup>43</sup> 170 CONG. REC. H1164 (daily ed. Mar. 13, 2024) (statement of Rep. Cathy McMorris Rodgers) (emphasis added); *see also*, at H1165 (statement of Rep. Raja Krishnamoorthi) ("This influence campaign illustrates the need for this bill."); *id.* at H1169 (statement of Rep. Christopher Smith) (calling the measure "a real time demonstration of the insidious use of TikTok" to target "American children with Communist Party propaganda").

<sup>44</sup> Bobby Allyn, *TikTok Is Back Online in the U.S., Following Trump's Promise to Pause the Ban*, NPR (Jan. 19, 2025), <https://www.npr.org/2025/01/19/nx-s1-5267568/tiktok-back-online>.

<sup>45</sup> Reply Brief for Respondent, *TikTok Inc. v. Garland*, 2025 WL 66985, at \*23.

online by assuring providers that they would not face any enforcement action.<sup>46</sup> Perhaps not wanting to be seen as the anti-TikTok party, given the app's popularity and the clear signals that the incoming President would work to "save" the app, Biden Administration officials said simply that "it will be up to the next administration to implement" the law.<sup>47</sup>

Upon entering office on January 20, President Trump immediately issued an executive order directing his Attorney General not to enforce the law while his Administration attempted to negotiate a solution, and imposing a seemingly random 75-day "deadline" that has since been extended four times.<sup>48</sup> Trump has never offered a compelling explanation for this change of heart. At the signing of the first executive order staying TikTok's execution, he stated that the reason he no longer wanted to ban the app was "Because I got to use it."<sup>49</sup> It's true that following his first attempt to ban TikTok, Trump amassed a significant following on the platform.<sup>50</sup> But the real explanation might be even more cynical: Trump first started talking about trying to save the platform almost immediately after a meeting with a megadonor who reportedly has a major financial stake in the company.<sup>51</sup> At the very least, Trump has never suggested that the reason he changed his mind about the platform was because of new facts or circumstances that altered the national security risks involved.

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<sup>46</sup> Carol E. Lee et al., *Biden Administration Has No Plans to Fine Companies if TikTok Ban Goes into Effect*, NBC NEWS (Jan. 16, 2025), <https://www.nbcnews.com/politics/joe-biden/biden-administration-no-plans-fine-companies-tiktok-ban-rcna188062>.

<sup>47</sup> Clare Duffy, *TikTok Is Set to Be Banned Sunday. Here's What It Means for You*, CNN: BUSINESS (Jan. 17, 2025), <https://www.cnn.com/2025/01/17/tech/tiktok-getting-banned-trump-biden>.

<sup>48</sup> Exec. Order No. 14,352 (Saving TikTok While Protecting National Security), 90 Fed. Reg. 47219 (Sep. 25, 2025) (extending deadline and listing previous executive orders doing the same).

<sup>49</sup> David McCabe, *Trump Signs Executive Order in Attempt to Stall TikTok Ban*, N.Y. TIMES (Jan. 23, 2025), <https://www.nytimes.com/2025/01/20/technology/trump-tiktok-ban-delay-executive-order.html>.

<sup>50</sup> Emily Taylor, *Why Trump's Change of Heart on TikTok? This Is About Self-Interest, Not Security*, GUARDIAN (Jan. 29, 2025), <https://www.theguardian.com/commentisfree/2025/jan/29/donald-trump-tiktok-security-threat-us-ban-chinese-platform-espionage>.

<sup>51</sup> Soo Rin Kim & Lalee Ibssa, *Trump's TikTok Ban Reversal Comes After Meeting Megadonor Who Has Stake in TikTok*, ABC NEWS (Mar. 11, 2024), <https://abcnews.go.com/Politics/trumps-tiktok-ban-reversal-after-meeting-megadonor-stake/story?id=108013785>.

Congress has by and large been quiescent about this flouting of the law it passed ostensibly in response to a dire national security threat.<sup>52</sup> When asked about this extraordinary situation, even the sponsors of the law in Congress have refused to comment.<sup>53</sup> This is not simply a product of partisan politics and acquiescence to the new President's clear preference that the platform continue to operate. The congressional change of heart toward the platform (and its ostensible national security risks) is as bipartisan as the movement to ban the bill was. The Democrats' leader in the Senate, Chuck Schumer, even introduced a bill seeking to extend PAFACAA's sale-or-ban deadline.<sup>54</sup> The bill failed but it has proved a moot point—the President has simply ignored formalities like the terms of the Act passed by Congress. Instead, the platform remains online as the Trump Administration is reportedly negotiating a sale of the app—one of the most important sites of public discourse in the country—to the President's political allies.<sup>55</sup>

This chain of events is hard to reconcile with any explanation other than that both the momentum to ban TikTok and the subsequent refusal to object to the lawless refusal to enforce the law have been informed more by shifting politics than changing national security risks. When it was politically expedient to ban the platform, lawmakers argued fervently that it was a national security threat. When it wasn't, they didn't. The point of First Amendment judicial review is to force Congress to bear the burden of proving that its speech restrictions are necessary to promote the proffered governmental interest. But in this case, not even Congress has acted like the national security threats it asserted to justify the law are compelling in retrospect. How, then, did PAFACAA survive a First Amendment challenge? The next Part turns to that story.

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<sup>52</sup> Alan Rozenshtein, *Lessons Learned from the TikTok Saga*, LAWFARE (Nov. 19, 2025), <https://www.lawfaremedia.org/article/lessons-learned-from-the-tiktok-saga>.

<sup>53</sup> Lauren Feiner, *Even the Lawmakers Behind the TikTok Ban Have No Idea What's Going On*, VERGE (Nov. 17, 2025), <https://www.theverge.com/policy/822164/tiktok-deal-trump-china>.

<sup>54</sup> *Leader Schumer Floor Remarks Urging an Extension of the TikTok Ban—To Allow Time for a Workable Solution—To Protect Americans' Livelihoods and Protect Against CCP Surveillance*, SENATE DEMOCRATS (Jan. 16, 2025), <https://www.democrats.senate.gov/news/press-releases/leader-schumer-floor-remarks-urging-an-extension-of-the-tiktok-ban-to-allow-time-for-a-workable-solution-to-protect-americans-livelihoods-and-protect-against-ccp-surveillance>.

<sup>55</sup> Lauren Hirsch, Tripp Mickle & Emmett Lindner, *Trump Clears Way for American-Owned TikTok Valued at \$54 Billion*, N.Y. TIMES (Sep. 25, 2025), <https://www.nytimes.com/2025/09/25/technology/trump-tiktok-ban-deal.html>.

## II. THE DOCTRINAL STORY

Modern First Amendment doctrine defines itself almost as much by what it seeks to avoid as what it wants to achieve. It is fair to say that a principal objective of the entire doctrinal edifice that has been created since the mid-twentieth century is to ensure that never again does the Court sit idly by while the government engages in the kind of repression that characterized the First and Second Red Scares. This is why First Amendment courses almost invariably start with *Abrams* and *Whitney* and their ilk and why modern First Amendment law is often framed by both academics and judges as a reaction against those mistakes. The Court is supposed to constrain the suppressive tendencies of the political branches and their habit of using the fear of external threats to justify censorship.

Thus, the specter that hung over the *TikTok* proceedings was the specter of *Abrams* and *Whitney*. PAFACAA sought to shut down a vibrant speech platform in the name of national security. The government—and ultimately the Court, in upholding PAFACAA—needed to distinguish the law from the kind of speech suppression that characterized these moments in history. The Court had to convince itself, and readers, that it was not repeating the mistakes of the past.

One way the Court could have escaped this shadow was by taking what we might call the *Holder* path. In *Holder v. Humanitarian Law Project*,<sup>56</sup> the Supreme Court upheld a law that criminalized providing “material support” to designated foreign terrorist organizations, and defined “material support” to include speech that amounted to “training” and “expert advice or assistance.”<sup>57</sup> In rejecting a First Amendment challenge brought by human rights organizations that wanted to train designated foreign terrorist organizations how to pursue their political aims peacefully, the Court “[f]or the first time in its history . . . upheld the criminalization of speech advocating only nonviolent, lawful ends,”<sup>58</sup> and it did so because it accepted the government’s argument that this kind of speech posed a national security threat. In some respects, then, the decision in *Holder* granted

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<sup>56</sup> 561 U.S. 1 (2010).

<sup>57</sup> 18 U.S.C. §§ 2339B(g)(4), 2339A(b)(1).

<sup>58</sup> David Cole, *The First Amendment’s Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine General Essay*, 6 HARV. L. & POL’Y REV. 147, 149 (2012).

more power to the government than even *Abrams* and *Whitney*. But the Court distinguished the case at hand from those disfavored opinions by applying, formally at least, the kind of demanding scrutiny of the government's actions that the World War I and Red Scare Court had neglected.<sup>59</sup> The material support laws were constitutional, the Court held, because Congress and the Executive had made findings that they were necessary to achieve the "urgent objective of the highest order" of combatting terrorism, and the government was entitled to deference in this conclusion because the case implicated "sensitive and weighty interests of national security and foreign affairs."<sup>60</sup>

As David Cole (counsel for the plaintiffs in *Holder*) has convincingly argued, the evidence that Congress and the Executive Branch relied on when enacting and arguing in support of the law was in fact very weak, and it is hard to reconcile *Holder* with the "demanding" scrutiny that the Court typically applies to content-based regulations of speech.<sup>61</sup> But even so, it remains significant that the *Holder* Court assumed that demanding scrutiny was necessary to sustain the law against a First Amendment challenge, and furthermore that it suggested that the only reason the law was able to satisfy such scrutiny was the unique deference owed to the political branches in the context of national security and foreign affairs. As Cole notes, had the Court instead accepted the government's argument that the statute did not require heightened scrutiny, "the damage done to First Amendment jurisprudence would have been much greater," because the reasoning would not have been limited to that context.<sup>62</sup> Instead, by applying demanding scrutiny, the Court was signaling that *Holder* should be understood as a *limited* and *rare* exception to the general First Amendment rule against content-based speech restrictions that should not easily carry over into other contexts.<sup>63</sup>

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<sup>59</sup> *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010); see also Cole, *supra* note 58, at 148 (observing that the Court appeared to apply strict scrutiny, although it did not explicitly use that term).

<sup>60</sup> *Holder*, 561 U.S. at 33–34.

<sup>61</sup> Cole, *supra* note 58, at 158.

<sup>62</sup> *Id.* at 160 n.67.

<sup>63</sup> Indeed, the Court went out of its way to emphasize the limits of its holding. See *Holder*, 561 U.S. at 39.

The Court could have taken the same approach in *TikTok*. Indeed, the majority in the D.C. Circuit did exactly that, showing great deference to every step of the government's argument that China poses a significant national security risk, that the publicly known information about TikTok supports the government's conclusion that the platform materially increases that risk, and that the government was justified in concluding that no less restrictive alternative to a ban adequately addressed the government's concerns.<sup>64</sup> As in *Holder*, the D.C. Circuit did not think it its place to probe this evidence deeply.<sup>65</sup>

The Supreme Court did not take this path out of the shadow of *Abrams*, however. Perhaps it was too much to swallow, especially in light of the Court's recent protestations that laws subject to strict scrutiny should almost always be struck down, absent truly extraordinary circumstances.<sup>66</sup> The public record in this case, on which the Court relied, includes only generalities, extended chains of causation, and speculation about future events that would not ordinarily meet this bar.<sup>67</sup> Perhaps, for this reason, a *Holder*-style opinion would have been too recognizably a redux of the mistakes of *Abrams* and *Whitney*. But although unconvincing, such a decision would at least have been admirably transparent—it would highlight that the Court was simply abdicating its responsibility to meaningfully review the law because of the government's extreme national security arguments, and it would have confined the decision's impact to similar foreign affairs and national security contexts.

Instead, the Court justified its decision to uphold PAFACAA by employing three doctrinal moves that all downplay the First

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<sup>64</sup> *TikTok Inc. v. Garland*, 122 F.4th 930, 953–65 (D.C. Cir. 2024).

<sup>65</sup> *Id.* at 955 (“The petitioners raise several objections to each national security justification, which we take up next, but the bottom line is that they fail to overcome the Government’s considered judgment and the deference we owe that judgment.”).

<sup>66</sup> *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 485 (2025) (“[Strict scrutiny] succeeds in that purpose if and only if, as a practical matter, it is fatal in fact absent truly extraordinary circumstances.”).

<sup>67</sup> *TikTok Inc. v. Garland*, 604 U.S. 56, 74 n.3 (2025). There is no public evidence the Chinese government has engaged in the kinds of practices that the United States government relied on to justify PAFACAA. See *TikTok*, 122 F.4th at 960 (“[T]he Government acknowledges that it lacks specific intelligence that shows the PRC has in the past or is now coercing TikTok into manipulating content in the United States.”). One lawmaker also said that the evidence given in private briefings was “not very compelling,” that there was “no real information” and it was “very vague.” Video posted by Rep. Alexandria Ocasio-Cortez (@aoc), *TikTok, Let’s talk about the Tiktok Ban. . . #tiktokban* (Jan. 18, 2025), <https://www.tiktok.com/@aoc/video/7461422720920849710>.

Amendment concerns raised by the case in a much more sweeping fashion than the move employed in *Holder*: first, the Court suggested that because PAFACAA regulated corporate ownership and control, it might not trigger First Amendment scrutiny at all; second, the Court ignored the content-related reasons Congress passed PAFACAA by holding that courts can ignore unconstitutional motivations so long as the government can point to another plausible motivation for its actions; and third, it was highly deferential to the government's explanation for why PAFACAA singled out a particular speaker for disfavored treatment. Each of these moves is deeply flawed as a matter of First Amendment theory and practice. And each threatens to create sweeping workarounds of general First Amendment protections that apply far more broadly than the national security context. In this Part, I take each of these moves in turn and show their flawed premises and startling implications.

#### A. THE CORPORATE OWNERSHIP LOOPHOLE

Perhaps the most jaw-dropping part of *TikTok* is the suggestion from seven members of the Court that PAFACAA might not implicate the First Amendment at all because the law could be understood as simply a regulation of corporate ownership rather than speech.<sup>68</sup> Ultimately, the Court assumed without deciding that First Amendment scrutiny applied, but the idea that this was even open to question is alarming. It was a product of the highly formalistic reading of PAFACAA that characterized the whole opinion, and which minimized the law's speech-related objectives and effects.

To understand this aspect of the opinion, it is necessary to be a bit more precise about the mechanics of the law. Although PAFACAA is often described as a law banning TikTok, as noted above, the law also provided an alternative outcome. TikTok could remain freely available in the United States if it underwent a "qualified divestiture," such that it was "no longer . . . controlled by a foreign adversary."<sup>69</sup> The government argued that PAFACAA was therefore not a ban at all, and in fact did not even regulate speech. It simply regulated ownership and

<sup>68</sup> *TikTok*, 604 U.S. at 68; see also Genevieve Lakier, *The TikTok Ban and the Limits of the First Amendment*, LPE PROJECT (Jan. 22, 2025), <https://lpeproject.org/blog/the-tiktok-ban-and-the-limits-of-the-first-amendment> (making this argument).

<sup>69</sup> Pub. L. No. 118–50, § 2(a)(1), (g)(6)(A), 138 Stat. 955 (2024).

control of the app, and to the extent that the law affected speech (for example, by resulting in the shutdown of the entire platform), this would be the entirely “incidental” result of ByteDance’s refusal to sell (or the Chinese government’s refusal to approve such a sale) rather than government censorship.

The Court did not accept the government’s characterization of the law. Instead, it proceeded on the basis that it was not commercially feasible for TikTok to undergo divestment in the time provided by the Act, and that the law was therefore in practice indistinguishable from a ban.<sup>70</sup> Nevertheless, and quite remarkably, the per curiam opinion still sounded sympathetic to the argument that because PAFACAA simply regulated corporate ownership it was not of First Amendment concern. Noting that the plaintiffs had failed to “identif[y] any case in which this Court has treated a regulation of corporate control as a direct regulation of expressive activity or semi-expressive conduct,” the Court said it was reluctant “to break . . . new ground in this unique case.”<sup>71</sup>

But the Court went further than merely holding that PAFACAA was not a *direct* speech regulation. It also suggested that even the incidental impact the law had on protected speech might not justify the application of First Amendment scrutiny. The Court said that “[a] law targeting a foreign adversary’s control over a communications platform” was not like other conduct regulations that the Court had subjected to First Amendment scrutiny because of their incidental effects on speech. This was for three reasons: “[T]he Act’s focus on a foreign government, the congressionally determined adversary relationship between that foreign government and the United States, and the causal steps between the regulations and the alleged burden on protected speech.”<sup>72</sup>

This last reason—which presumably refers to the fact that although a platform’s content moderation decisions are downstream from its ownership, the impact of ownership on content is not necessarily clear-cut—is hard to make sense of. Recall that one of the explicit rationales for PAFACAA was that ByteDance’s ownership of the app would allow China to manipulate the content on the platform.

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<sup>70</sup> *TikTok*, 604 U.S. at 69 (referring to the law as “an effective ban”).

<sup>71</sup> *Id.* at 68.

<sup>72</sup> *Id.* at 69.

That is, the “causal steps” between PAFACAA and the impact on protected speech (and, correspondingly, the protected right of American users to access that speech, even if “manipulated”) were not attenuated or contrived—they were one of the *justifications* for the law. Laws that regulate expression as part of a broader regulation of conduct typically trigger not just intermediate but strict scrutiny when the motivations behind them are “[r]elated to the suppression of free expression.”<sup>73</sup> While professing to not want to break new ground, the *TikTok* opinion was doing exactly that. Its insensitivity to the ways PAFACAA’s ownership provisions were clearly intimately bound up with concerns over speech stands in marked contrast to how First Amendment doctrine usually treats laws that indirectly seek to control speech in this way.

To be sure, it would be stretching the First Amendment too far to say that *any* regulation of corporate ownership, even of speech platforms, may implicate the First Amendment. It is settled law and common sense that no First Amendment objection can be raised to laws of general application merely because they in some way affect an expressive business.<sup>74</sup> This is so even when the effects on speech are significant. Take *Arcara v. Cloud Books*,<sup>75</sup> much discussed by the parties and the Court in *TikTok*. In that case, an adult bookstore was ordered to close under a general public health law that prohibited the use of commercial premises for prostitution.<sup>76</sup> The bookstore argued that the closure order violated the First Amendment because it prevented the store from selling books, a clearly First Amendment-protected activity. But the Court rejected this argument because prostitution, the target of the regulation, was not protected expression, and the law did not single out bookstores or any other expressive businesses.<sup>77</sup> Instead, this was merely the “enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books.”<sup>78</sup>

<sup>73</sup> United States v. O’Brien, 391 U.S. 367, 377 (1968).

<sup>74</sup> See, e.g., Associated Press v. United States, 326 U.S. 1, 20 (1945) (“The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.”); Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue, 460 U.S. 575, 581 (1983) (stating “[i]t is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems,” and collecting cases).

<sup>75</sup> *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986).

<sup>76</sup> *Id.* at 699.

<sup>77</sup> *Id.* at 707.

<sup>78</sup> *Id.*

This straightforward rule from *Arcara* does not lead to the conclusion that no First Amendment scrutiny was warranted in *TikTok*, however. PAFACAA in no way resembles the public health regulation at issue in that case. It is not a law of general application, but instead singles out TikTok for disfavored treatment. Moreover, it is not targeted at clearly non-expressive unlawful conduct; instead, a primary concern of the law was the protected speech on the platform and China's capacity to manipulate it. And while not every effect on an expressive business implicates the First Amendment, it is also settled law and common sense that the government cannot avoid the First Amendment by achieving its censorious objectives indirectly.<sup>79</sup> This is why the government cannot burden the press by taxing ink and paper and calling it a simple sales tax.<sup>80</sup> Or, in the case of campaign finance regulations, why the government cannot regulate corporate expenditures on political campaigns,<sup>81</sup> or demand that people speak through particular corporate structures,<sup>82</sup> and insist these are merely regulations of money or corporate form and not speech regulations. Whatever else one makes of the Court's campaign finance jurisprudence, this aspect of its reasoning reflects an important insight: Congress cannot evade the First Amendment simply by formally regulating something other than speech. And for good reason: A First Amendment doctrine that protected against only the most obvious and direct restrictions on speech would leave many loopholes for the government to exploit. Declaring that the regulation of corporate ownership and control is beyond the purview of First Amendment concern would do just that.

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<sup>79</sup> *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 190 (2024) (“[A] government official cannot do indirectly what she is barred from doing directly.”).

<sup>80</sup> *Minneapolis Star & Trib. Co.*, 460 U.S. at 586.

<sup>81</sup> *Buckley v. Valeo*, 424 U.S. 1, 17 (1976) (“Even if the categorization of the expenditure of money as conduct were accepted, the limitations challenged here would not meet the O’Brien test because the governmental interests advanced in support of the Act involve ‘suppressing communication.’”).

<sup>82</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 337 (2010) (“Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak . . . A PAC is a separate association from the corporation. So the PAC exemption from § 441b’s expenditure ban, § 441b(b)(2), does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with § 441b. PACs are burdensome alternatives.”).

The concerning implications of such a rule become even more obvious if one considers the many other contexts in which it would apply. Imagine if Congress passed a law mandating that Elon Musk sell X<sup>83</sup> and expressly justified the law because it feared Musk might favor conservative content on the platform. Or if it did the same regarding the *New York Times*, after expressing dissatisfaction with the paper's editorial slant. It is hard to imagine the Court finding in either of these cases that the “causal steps between the regulations and the alleged burden on protected speech” were too remote to require First Amendment scrutiny.

Indeed, we don't even need to look at hypotheticals. The events that have unfurled since *TikTok* was handed down plainly illustrate how corporate ownership can be manipulated in ways that raise concerns about government influence over public discourse. Although the details remain unclear at the time of this writing, reporting suggests that the Trump Administration is brokering a deal for TikTok's ownership to transfer to political allies of the President.<sup>84</sup> And while Trump has disclaimed any intention for the platform to favor pro-Trump content as a result,<sup>85</sup> PAFACAA itself was a response to the fact that the owner of a platform can influence the content on it to favor certain viewpoints, and that statements that they would do no such thing are of limited reassurance. Now, though, TikTok's ownership is being negotiated by and under the influence of the American government—the very actor that the First Amendment primarily seeks to protect the independence of the public sphere against.<sup>86</sup>

The Court's other reasons for why PAFACAA might not trigger First Amendment scrutiny were because the Act focused on adversarial foreign governments. But it's not clear why this would mean the law evades First Amendment scrutiny altogether, rather than that it

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<sup>83</sup> Petitioners made versions of this argument, evidently to limited effect. *See, e.g.*, Brief for Petitioners, *Firebaugh v. Garland*, 2025 WL 1121113, at \*6 (asking the Court to imagine “if Congress ordered The Washington Post or X to divest its ownership”); Transcript of Oral Argument at 74, *Firebaugh v. Garland*, 604 U.S. 56 (2025) (No. 24–657).

<sup>84</sup> Hirsch, Mickle & Lindner, *supra* note 55.

<sup>85</sup> *Id.*

<sup>86</sup> It is worth noting that even if this particular lawless outcome was not foreseeable, PAFACAA always made the completion of a “qualified divestiture” (and, thus, the avoidance of the Act's ban provisions) subject to a Presidential determination that the Act's requirements had been met. Pub. L. No. 118–50, § 2(g)(6), 138 Stat. 955 (2024). Thus, the law the Supreme Court upheld always contemplated the government having a role (albeit a much more limited one) in negotiating the terms of a sale.

would potentially survive First Amendment scrutiny once applied, as in *Holder*. The question is not whether TikTok's China-based owner ByteDance, or the Chinese government for that matter, have First Amendment rights. Indeed, the Court made sure to affirm that they do not.<sup>87</sup> But this does not obviate the need to protect TikTok's First Amendment rights, as an American company, or those of its American users. The Court's case law makes clear that there is a right to hear the speech of even hostile foreign government actors. In *Lamont v. Postmaster General*, the Court held that it violated the First Amendment to burden Americans' right to receive Chinese Communist propaganda.<sup>88</sup> The *TikTok* Court therefore cannot be understood to be suggesting that PAFACAA might not trigger First Amendment scrutiny simply because it was related to the speech of foreigners and foreign governments.

Perhaps the Court was referring to the government's argument that PAFACAA resembled other laws that restricted the foreign ownership or control of various forms of infrastructure without triggering First Amendment concerns.<sup>89</sup> Indeed, in the court below, Chief Judge Srinivasan had held that PAFACAA was "in step with longstanding restrictions on foreign control of mass communications channels."<sup>90</sup> But the only communications-related precedent the government or Chief Judge Srinivasan was able to point to involved broadcast media, which enjoy uniquely limited First Amendment protection due to spectrum scarcity.<sup>91</sup> Even if a record of consistent

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<sup>87</sup> *TikTok Inc. v. Garland*, 604 U.S. 56, 69 n.2 (2025).

<sup>88</sup> 381 U.S. 301, 305 (1965).

<sup>89</sup> Brief for Respondent, *TikTok Inc. v. Garland*, 2024 WL 5264657, at \*39 (citing examples of foreign ownership restrictions including banks, dams, nuclear facilities, undersea cable licenses and air carriers); see also Ganesh Sitaraman, *The Regulation of Foreign Platforms*, 74 STAN. L. REV. 1073 (2021) (discussing foreign ownership restrictions in the banking, transportation and energy industries).

<sup>90</sup> *TikTok Inc. v. Garland*, 122 F.4th 930, 970 (D.C. Cir. 2024).

<sup>91</sup> *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 389–90 (1969); *Reno v. ACLU*, 521 U.S. 844, 868 (1997) (refusing to apply the broadcast precedents to the internet). Chief Judge Srinivasan also pointed to a law that restricted foreign ownership of wired transmission lines. See *TikTok*, 122 F.4th at 973 (Srinivasan, C.J., concurring). However, this is more akin to other restrictions that limit foreign ownership of critical physical infrastructure than it is to laws that restrict foreign ownership of a speech platform because of content-based concerns in that the concern appears to be physical interference with wired transmissions, rather than the speech that would pass across them. In any event, ex ante sector-wide regulations are different in kind from the ex post singling out of an individual platform because of content concerns, as I discuss below. See *infra* Part II.C.

historical practice were sufficient to lower the level of First Amendment scrutiny that applied,<sup>92</sup> there is no such history or tradition of laws restricting foreign ownership of speech platforms that would justify an exception to the ordinary First Amendment rules. As Part I described, such heavy-handed regulation is simply not how the United States has traditionally thought about the government's role in the public sphere.

All told, it is perplexing why the Court felt it necessary to float the thought-bubble that ownership restrictions might not implicate the First Amendment, given the significant implications of that idea and the fact that the Court went on to apply First Amendment scrutiny anyway. Whatever the reason, the suggestion should be understood as ill-considered obiter, rather than as an invitation to legislatures to evade the strictures of the First Amendment simply by framing speech regulations as corporate restructuring.

By looking strictly at the mechanics of PAFACAA's operation and not its intended effect, the Court blinded itself to the way the government was intervening in the marketplace of ideas. This was emblematic of the kind of abstract reasoning that pervaded the *TikTok* decision and was only possible because of the second problematic doctrinal move the Court made: ignoring the explicit speech-related motives behind the law.

#### B. THE MIXED-MOTIVES LOOPHOLE

No one disputed that Congress passed PAFACAA at least in part because of concerns about the content on the platform—including, but not limited to, China's ability to manipulate that content covertly. Nevertheless, the Court ignored these motivations entirely when assessing the constitutionality of the law. It found that Congress would have passed PAFACAA based on the data collection rationale alone and held that therefore no other motivations mattered to the legal analysis. "We need not determine the proper standard for mixed-justification cases or decide whether the Government's [content manipulation rationale] is content neutral," the Court held. Its conclusion that the data manipulation rationale was a sufficient cause of Congress

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<sup>92</sup> It is worth noting that *TikTok* includes no discussion of history and tradition at all, despite the Court's increasing reliance on such methodology in other areas of constitutional law.

passing the law rendered these questions, on its view, irrelevant. “Even assuming [the content manipulation] rationale turns on content . . . [t]he record before us adequately supports the conclusion that Congress would have passed the challenged provisions based on the data collection justification alone.”<sup>93</sup> Again, this is a remarkably narrow understanding of PAFACAA and led to an extraordinary result: Congress passed a law *explicitly* concerned with the mix of content in the public sphere, and the Supreme Court unanimously turned a blind eye to that fact.

As I explain further below, the rule that, in mixed motive cases, courts should ignore content-based motivations whenever a content-neutral motivation might be a standalone cause for the law is flawed reasoning even if the assumption underpinning it (that Congress would have passed PAFACAA without the content manipulation rationale) were true. But *TikTok* was a particularly bad case in which to make law on this point. The content manipulation rationale was not some peripheral or subordinate motivation for PAFACAA—it was central to the enactment of the law, and crucial to its design.

To be sure, in what proved to be extremely savvy lawyering by Solicitor General Elizabeth Prelogar, the government greatly minimized the significance of the content manipulation rationale before the Supreme Court and leaned heavily on the data collection rationale. This was a last-minute change of tone, however. Before filing its reply brief with the Court, the government had *never argued* that Congress would have passed PAFACAA absent a concern about the content on the platform. This is evident in the decision of the D.C. Circuit, which explicitly stated that the law relied on both rationales. “[N]o party has identified any portion of the Act to which the data justification alone applies,” noted the majority to justify its application of strict scrutiny.<sup>94</sup> Chief Judge Srinivasan similarly noted that “the government makes no argument that the Act’s application to TikTok should be sustained based on the data-protection interest alone,” and for that reason it was necessary “to engage with the other interest underpinning the Act”<sup>95</sup>—the content manipulation rationale.

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<sup>93</sup> *TikTok Inc. v. Garland*, 604 U.S. 56, 78–79 (2025).

<sup>94</sup> *TikTok*, 122 F.4th at 952.

<sup>95</sup> *Id.* at 977 (Srinivasan, C.J., concurring).

Even the government's opening brief in the Supreme Court insisted that to win its case it was "not required to show that Congress would have adopted the Act" without the content manipulation rationale.<sup>96</sup> It argued that the Court could ignore the content manipulation rationale because the data security rationale was "a valid constitutional basis,"<sup>97</sup> but did not take the extra step of arguing that rationale was a sufficient cause for the passage of the Act by itself. Only in its reply brief, for the first time, did the government argue that there was "every reason to think that Congress would have adopted the Act based on the data-protection interest alone."<sup>98</sup>

The Court thus should at least have viewed this new argument with significant skepticism, coming as it did at the last possible moment in the litigation.<sup>99</sup> Instead, it simply accepted the government's assertion that Congress would have acted as it did even absent content-related concerns.

It's hard to understand why the Court was so ready to ignore Congress's content-based motivation. It might be tempting to explain this aspect of *TikTok* as falling within a line of cases in which the Court has refused to consider informal statements of lawmakers when determining governmental motivations. *United States v. O'Brien* establishes the general rule that courts will not invalidate a statute "on the basis of what fewer than a handful of Congressmen said about it."<sup>100</sup> In that case, the government denied having a content-based motivation altogether and the Court was reluctant to go fishing in the legislative record to question Congress's intent, holding that such inquiries into congressional purpose are "hazardous" because "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it."<sup>101</sup> Sounding a pragmatic note, the Court held that it would not invalidate a law "which Congress had the undoubted power to enact and which could be reenacted in its

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<sup>96</sup> Brief for Respondent, *TikTok Inc. v. Garland*, 2024 WL 5264657, at \*18.

<sup>97</sup> *Id.* at \*35.

<sup>98</sup> Reply Brief for Respondent, *TikTok Inc. v. Garland*, 2025 WL 66985, at \*13.

<sup>99</sup> *Cf. Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563 (2011) ("For the State to change its position is particularly troubling in a First Amendment case.").

<sup>100</sup> 391 U.S. 367, 384 (1968).

<sup>101</sup> *Id.*

exact form if the same or another legislator made a ‘wiser’ speech about it.”<sup>102</sup>

But *TikTok* is a very different case from *O’Brien*. The government never contested that the content manipulation rationale was *a* reason that Congress passed PAFACAA. Indeed, the Court explicitly acknowledged that the government defended the content manipulation rationale as a legitimate government interest.<sup>103</sup> Hence, although *O’Brien* might conceivably apply to lawmakers’ statements complaining about particular content on TikTok—for example, the amount of pro-Palestinian content after October 7—the rule cannot be applied to the content manipulation rationale more generally.

The question for the Court was not whether the content manipulation rationale existed, but instead whether this rationale could be severed from the data collection rationale, such that PAFACAA was not fundamentally tainted by Congress’s focus on the content on the platform. The Court gave no reasons for its conclusion that it could—perhaps because the record is so overwhelmingly pervaded by content concerns that there is little the Court could have pointed to.

As discussed in Part I, the sponsors of the law did *not* think Congress would have passed PAFACAA but for their concerns about the content on the platform, and specifically the prevalence of pro-Palestinian content after October 7.<sup>104</sup> Even if these specific concerns are excluded under the rule in *O’Brien*, the government *never* made a case for PAFACAA that did not include the content manipulation rationale more generally. As detailed above, the political and legislative campaign for the Act consistently focused on concerns about the potential for Chinese manipulation of content on the platform.<sup>105</sup> The House

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<sup>102</sup> *Id.* *Trump v. Hawaii* suggests that a similar rule applies to statements of the President about executive action, but it is unclear how much relevance this has outside the exceptional context of the admission and exclusion of foreign nationals involved in that case. *See Trump v. Hawaii*, 585 U.S. 667, 702–05 (2018).

<sup>103</sup> *TikTok Inc. v. Garland*, 604 U.S. 56, 78–79 (2025).

<sup>104</sup> *See supra* Part I.

<sup>105</sup> *See supra id.*; *see also* Brief of Amici Curiae Members of Congress in Support of Petitioners, *TikTok Inc. v. Garland*, 2024 WL 5273285, at \*11–12 (“The ban’s proponents during congressional deliberations criticized TikTok for purportedly ‘expos[ing] children to harmful content,’ restricting ‘topics that are sensitive to the Chinese government’ (like ‘content that blames China for th[e] pandemic’), and allowing content ‘glorify[ing] Hamas terrorists.’ Similarly, proponents sought to justify the ban on the theory that ‘TikTok is Communist Chinese malware that is poisoning the minds of our next generation’ and had ‘push[ed] harmful propaganda, including content showing migrants how to illegally cross our Southern Border, supporting Hamas terrorists, and whitewashing 9/11.’”).

committee report on the bill—the sum total of PAFACAA’s legislative history—referenced at the outset TikTok’s ability to “push misinformation, disinformation, and propaganda on the American public” as motivating the bill.<sup>106</sup> The floor debate about the bill also repeatedly highlighted such concerns.<sup>107</sup> And in the litigation over PAFACAA, the government did not shy away from the content manipulation rationale, instead insisting it was a compelling governmental interest.<sup>108</sup> In the court below, the government even identified particular debates it worried China might shape in nefarious ways.<sup>109</sup>

One does not even have to look at such legislative and litigation history. Congress’s content-related concerns are apparent from the very text of the statute. Most significantly, for TikTok to meet the requirements of a “qualified divestiture” under the Act, it had to change ownership and control *and* terminate any operational relationship with China “with respect to the operation of a *content recommendation algorithm* or an agreement with respect to data sharing.”<sup>110</sup> As Chief Judge Srinivasan so aptly summarized in his concurrence below, “[i]n the central operative provision of the Act . . . Congress established that a divestiture must satisfy the two national-security concerns invoked by the government in this case: data protection and content manipulation.”<sup>111</sup>

Before the Court, the government rejected this conclusion by arguing that even this requirement (that TikTok sever any ongoing operational relationship with China with respect to the content recommendation algorithm) could be justified by a concern with data collection alone because, the government explained, the content

<sup>106</sup> H.R. Rep. No. 118–417, at 2 (2024).

<sup>107</sup> 170 CONG. REC. H1164–70 (daily ed. Mar. 13, 2024) (see statements of Rep. Cathy McMorris Rodgers calling TikTok a “valuable propaganda tool,” Rep. Frank Pallone referring to the CCP’s ability to use TikTok to “promote pro-Communist propaganda, and undermine our Nation’s interests,” Rep. Nancy Pelosi referring to TikTok “suppressing the communications from Tibet,” and Rep. Chris Smith referring to “the targeting of American children with Communist Party propaganda,” amongst others).

<sup>108</sup> See, e.g., Brief for Respondent, TikTok Inc. v. Garland, 2024 WL 5264657, at \*18.

<sup>109</sup> TikTok Inc. v. Garland, 122 F.4th 930, 951 (D.C. Cir. 2024) (“[T]he Government identifies a particular topic—Taiwan’s relationship to the PRC—as a ‘significant potential flashpoint’ that may be a subject of the PRC’s influence operations.”).

<sup>110</sup> Pub. L. No. 118–50, § 2(g)(6)(B), 138 Stat. 955 (2024).

<sup>111</sup> *TikTok*, 122 F.4th at 976.

recommendation algorithm was trained on U.S. user data.<sup>112</sup> But this argument ignores the other requirement in the Act that a qualified divestiture preclude any ongoing relationship with the Chinese government “with respect to data sharing” which would seem to cover the government’s data concerns and make the reference to the content recommendation algorithm redundant.<sup>113</sup>

Congress’s pervasive concern about content manipulation is also evident in other features of PAFACAA. Recall that, alongside the TikTok-specific provisions, the law also included a more general mechanism for a company to become subject to the requirements of the Act if the President determined that the company presented a national security threat.<sup>114</sup> That mechanism, however, only applied to companies which operate an application that “permits a user to create an account or profile to generate, share, and view text, images, videos, real-time communications, or similar content,”<sup>115</sup> but exempted those “whose primary purpose is to allow users to post product reviews, business reviews, or travel information and reviews.”<sup>116</sup> That is: this provision only applied to applications whose primary purpose was to facilitate user speech, but certain kinds of content (seemingly those that were less likely to be political) were excluded. This focus on user-generated content platforms betrays, again, Congress’s preoccupation with the content manipulation rationale. If Congress was only concerned about data collection, all sorts of Chinese-owned platforms might raise concerns (for example, giant eCommerce sites like Alibaba, Shein and Temu, or search engine Baidu). The limitation of PAFACAA’s potential application to user-generated content platforms is thus further evidence that the content manipulation rationale was central to Congress’s motivation in drafting and passing the law.

It is therefore patently *not* the case that Congress would have enacted PAFACAA “in its exact form” while making “a ‘wiser’ speech about it” if it had not been motivated by concerns about content

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<sup>112</sup> *TikTok Inc. v. Garland*, 604 U.S. 56, 79–80 (2025) (“The Government has explained that ByteDance Ltd. uses the data it collects to train the TikTok recommendation algorithm, which is developed and maintained in China.”).

<sup>113</sup> Pub. L. No. 118–50, § 2(g)(6)(B), 138 Stat. 955 (2024).

<sup>114</sup> *Id.* § 2(g)(3)(B).

<sup>115</sup> *Id.* § 2(g)(2)(A).

<sup>116</sup> *Id.* § 2(g)(2)(B).

manipulation. The central operative provision and other features of the Act would have been quite different. PAFACAA's passage could not be severed from the content manipulation rationale.

The Court's decision to ignore the government's content-related concerns in the face of such overwhelming evidence is at odds with the typical preoccupation that First Amendment law has with concerns about invidious governmental intent, and in particular content-discriminatory motives.<sup>117</sup> The Court regularly seeks to smoke out illegitimate governmental motives, even when the government offers other reasons for its actions.<sup>118</sup> Indeed, as then-Professor Kagan once famously argued, "First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives."<sup>119</sup> Given this tradition, it is mystifying why the Court so easily brushed aside the government's repeated, unequivocal arguments that one of the reasons it passed PAFACAA was because it was concerned about the way TikTok might change the mix of content in the public sphere. Just last term, the Court identified laws that sought to "improve or

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<sup>117</sup> *City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 76 (2022) ("If there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction, for instance, that restriction may be content based."); *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 166 (2015) ("Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.").

<sup>118</sup> See, e.g., *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011) (considering formal legislative findings and the legislative record to confirm the Court's reading that the legislation in that case was aimed at particular kinds of content); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (noting that in the Free Exercise context, "as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence. Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body. These objective factors bear on the question of discriminatory object."); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 679–80 (1994) (O'Connor, J., concurring) ("[W]e have often struck down statutes as being impermissibly content based even though their primary purpose was indubitably content neutral. . . . [T]he mere possibility that a statute might be justified with reference to content is not enough to make the statute content based, and neither is evidence that some legislators voted for the statute for content-based reasons. But when a content-based justification appears on the statute's face, we cannot ignore it because another, content-neutral justification is present."); see also Case Comment, *TikTok Inc. v. Garland*, 139 HARV. L. REV. 280 (2025); Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1856–57 (2008).

<sup>119</sup> Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996).

better balance the speech market” as one of the greatest dangers to free expression there is.<sup>120</sup> And yet this is exactly what the content manipulation rationale amounted to: an attempt to improve the speech market by preventing what the government thought was improper skewing.

The Court should therefore have considered the content manipulation rationale, and once it considered it, it should have treated PAFACAA as a content-based regulation of speech that deserved the most searching judicial review. The government had argued otherwise on the basis that PAFACAA sought to “prevent the PRC’s secret curation of content flowing to U.S. users *regardless* of the topic, idea, or message conveyed.”<sup>121</sup> But the government’s identification of particular topics it was concerned China might exploit to advance its own interests before the court below belies this argument.<sup>122</sup> Even without this concession, the content-based nature of Congress’s motivation should have been clear. The content manipulation rationale reflects the government’s fear that China will manipulate the content on TikTok to make Americans believe things that are harmful to the national interest. But propaganda, including foreign propaganda, is just another label for an argument, and as such is protected expression.<sup>123</sup> And the Court held just last term that the kind of content curation social media platforms engage in is protected by the First Amendment as much as other kinds of speech.<sup>124</sup> Trying to prevent Americans from having access to their choice of social media curation is thus the *essence* of censorship and the heartland of what the First Amendment protects against.<sup>125</sup> “Content manipulation” might sound sinister, but it is also standard practice both online and off. As Justice Gorsuch said in his concurring opinion, “One man’s ‘covert

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<sup>120</sup> *Moody v. NetChoice, LLC*, 603 U.S. 707, 741 (2024).

<sup>121</sup> Brief for Respondent, *TikTok Inc. v. Garland*, 2024 WL 5264657, at \*25.

<sup>122</sup> *TikTok Inc. v. Garland*, 122 F.4th 930, 951 (D.C. Cir. 2024) (“[T]he Government identifies a particular topic—Taiwan’s relationship to the PRC—as a ‘significant potential flashpoint’ that may be a subject of the PRC’s influence operations.”).

<sup>123</sup> *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965) (holding that communist political propaganda from China was protected by the First Amendment).

<sup>124</sup> *Moody v. NetChoice, LLC*, 603 U.S. 707, 718 (2024).

<sup>125</sup> David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 335–37 (1991) (arguing that at the center of First Amendment law is the idea that “the government may not suppress speech on the ground that the speech is likely to persuade people to do something that the government considers harmful”).

content manipulation’ is another’s ‘editorial discretion.’”<sup>126</sup> If the government is scared that people will be led to hold wrong beliefs—about Palestine, Taiwan, China, or anything else—then the Constitution requires that the government convince them otherwise, not censor speech it doesn’t like, or shut down speakers it is afraid of.

The government should not be able to escape strict scrutiny by simply pointing to a second, content-neutral purpose. In cases where the legislature has explicitly relied on a content-based rationale to pass a law, courts should not try to recreate the essentially unknowable counterfactual of whether the legislature would or could have passed the law without the unconstitutional motivation.<sup>127</sup> This case illustrates why—it is impossible to tell whether the legislature, after years of trying, would have otherwise found the political momentum necessary to pass the Act without such invidious intent. Lawmakers certainly seem to think they wouldn’t have.<sup>128</sup> The government should not be permitted to disavow the arguments that helped motivate passage of a law later when it becomes inconvenient in litigation. *O’Brien* itself is premised on the idea that it is hazardous to search for legislative motivations beyond the official record.<sup>129</sup> This should cut both ways: Congress should not be able to walk away from invidious motivations it explicitly relied on.

The contrary rule would create perverse incentives for lawmakers. If the Court’s approach in *TikTok* is taken at face value, any speech-suppressive law, no matter how severe, can be sustained if Congress, or government lawyers after the fact, can come up with another plausible justification for that law. The lack of serious scrutiny the Court applied to the government’s arguments about the motivations behind PAFACAA suggest that the burden on the government to prove that this justification would actually have supported the law is

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<sup>126</sup> *TikTok Inc. v. Garland*, 604 U.S. 56, 81 (2025).

<sup>127</sup> Courts permit such an inquiry in First Amendment retaliation cases involving non-legislative actors. *Cf. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). But this rule should not be extended to legislative decisionmaking, because the question of determining what a collective, political body like a legislature would have done in different circumstances is much more difficult to determine than what an individual actor would have done. Similarly, non-First Amendment cases are distinguishable, because they do not raise the same concerns about the chilling effects on protected expression created by lawmakers publicly expressing motivations grounded in content- or viewpoint-based discrimination. *Cf. Hunter v. Underwood*, 471 U.S. 222, 228 (1985).

<sup>128</sup> *See supra* notes 34–41 and accompanying text.

<sup>129</sup> *United States v. O’Brien*, 391 U.S. 367, 383–84 (1968).

practically non-existent. Such a rule would allow the government to invoke speech suppressive purposes to generate political and public support for legislative action and also perhaps chill the speech of those to whom the law applies, and then avoid any First Amendment scrutiny by simply providing another justification for the law alongside its censorious one. This would be a dangerous loophole in the First Amendment's protections. Again, hypotheticals illustrate how untenable such a rule would be in practice. Imagine Congress instead stated that it was banning TikTok because it favored Democrats, and also raised data security concerns. Or because too many Black (or white) people posted on the platform, and also there were data security concerns.<sup>130</sup> It is unlikely the Court would find such motivations constitutionally irrelevant.

By contrast, if a mixed-motives law fails strict scrutiny but actually *would* have been passed without the censorious motivation, then Congress can go ahead and enact that law on that basis again. This is not a mere formality. Requiring that legislators actually demonstrate the sufficiency of their non-content-related motives prevents the Court from laundering the government's speech suppression by taking a law that in any other circumstance would be subject to the most demanding review and purifying it of its censorious objectives if there is sufficiently clever government lawyering.

Instead, in *TikTok*, this kind of laundering of bad motives is exactly what the Court permitted. And its conclusion that it could ignore the content manipulation rationale also paved the way for the last piece of doctrinal damage the *TikTok* decision threatens to create: allowing the government to regulate individual speakers without raising First Amendment suspicion.

### C. THE SPECIAL SPEAKER LOOPHOLE

The final astonishing doctrinal move that the Court made in *TikTok* is to dismiss the idea that PAFACAA's explicit targeting of TikTok was in any way constitutionally suspect. "[T]he Government had good reason to single out TikTok for special treatment,"<sup>131</sup> the per curiam decision held. There was thus no need to review this feature of the law with skepticism. This is, again, a break with First

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<sup>130</sup> I am grateful to Jeff Fisher for these examples.

<sup>131</sup> *TikTok*, 604 U.S. at 76.

Amendment precedent, and a dangerous one that threatens to open yet another loophole in the doctrine for the government's censorious impulses to pass through.

In fact, remarkably, by focusing on the TikTok-specific provisions of PAFACAA, the Court was able to justify the application of a *lesser* standard of scrutiny than would have otherwise applied. As discussed in the previous section, PAFACAA's non-TikTok-related provisions referred to user-generated content platforms, but exempted platforms whose primary purpose was to allow users to post certain kinds of (less politically sensitive) content. This transparently content-based exemption would ordinarily require the application of strict scrutiny.<sup>132</sup> But the Court held that because the plaintiffs were challenging the TikTok-specific provisions of PAFACAA, it could ignore this exemption. The content-based exclusion "applies only to the general framework for designating applications"<sup>133</sup> to be subject to PAFACAA, the Court held, and therefore was irrelevant in determining the standard of scrutiny to apply in the case at hand.

If the Court had applied strict scrutiny to the TikTok-specific provisions of PAFACAA because they singled out a specific speaker, its refusal to reckon with the clear content-based discrimination in the rest of the Act would not matter. But this is not what happened, despite precedents that strongly suggest it should have been. As the Court summarized only a few years ago, First Amendment "precedents are deeply skeptical of laws that 'distinguish[h] among different speakers, allowing speech by some but not others.'"<sup>134</sup> This is because

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<sup>132</sup> *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."); *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 619 (2020) (finding that a law that applied generally to robocalls but excepted calls made for the purposes of government-debt collection was "about as content-based as it gets" and therefore applying strict scrutiny).

<sup>133</sup> *TikTok*, 604 U.S. at 72.

<sup>134</sup> *Nat'l Inst. of Fam. & Life Advoc. v. Becerra*, 585 U.S. 755, 777–78 (2018); *see, e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) ("Prohibited . . . are restrictions distinguishing among different speakers, allowing speech by some but not others."); *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 784–85 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue."); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 659 (1994) ("Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns."); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 569–70 (2011) (holding that the speaker-based nature of the law in that case justified heightened scrutiny); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221,

“[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content.”<sup>135</sup>

Not all speaker distinctions require strict scrutiny. Although the Court has never explicitly described it as such, speaker-based distinctions are in practice understood to create a *presumption* in favor of strict scrutiny, which the government can rebut by showing that a speaker distinction in a particular case is not a proxy for content-based discrimination, but is instead “justified by some special characteristic” of the targeted speaker.<sup>136</sup> This rule is why certain professional speakers can be treated differently consistent with the First Amendment,<sup>137</sup> for example, or why legislatures can single out kinds of media, like newspapers, for tax exemptions if there is no reason to suspect that the reason for the distinction is content-related.<sup>138</sup>

The *TikTok* Court noted this rule but then went on to summarily conclude that the singling out of TikTok was not “a subtle means of exercising a content preference,” but instead was based on “a content-neutral data collection interest” that was justified by TikTok’s “special

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228 (1987) (“[S]elective taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State.”); *Brown v. Ent. Merchs. Assn.*, 564 U.S. 786, 802 (2011) (singling out purveyors of video games for disfavored treatment without a persuasive reason “raise[d] serious doubts about whether the government [wa]s in fact pursuing the interest it invoke[d], rather than disfavoring a particular speaker or viewpoint”).

<sup>135</sup> *Citizens United*, 558 U.S. at 340.

<sup>136</sup> *TikTok*, 604 U.S. at 72 (quoting *Minneapolis Star & Trib. Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 575 (1983)).

<sup>137</sup> See, e.g., *Lowe v. S.E.C.*, 472 U.S. 181, 228 (1985) (White, J., concurring) (“Regulations on entry into a profession, as a general matter, are constitutional if they ‘have a rational connection with the applicant’s fitness or capacity to practice’ the profession.” (quoting *Schwartz v. Bd. of Bar Exam’rs*, 353 U.S. 232, 239 (1957))); Claudia E. Haupt, *Licensing Knowledge*, 72 VAND. L. REV. 501, 506–07 (2019) (noting that the regulation of professional speech is justified by that speech’s distinctive characteristics, including that it is “individualized to the situation of the client, it is tied to a body of disciplinary knowledge from which it gains authority, and it occurs within a social relationship that is defined by knowledge asymmetry between speaker and listener, reliance on the speaker’s advice, and trust in the accuracy of that advice”); Robert Post, *NIFLA and the Construction of Compelled Speech Doctrine*, 97 IND. L.J. 1071, 1083 (2022) (“[L]aw constructs physician-patient relationships to underwrite patients’ warranted expectations of competent medical care.”).

<sup>138</sup> See, e.g., *Leathers v. Medlock*, 499 U.S. 439, 453 (1991) (“[D]ifferential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas.”); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 194 (1946); *Mabee v. White Plains Pub. Co.*, 327 U.S. 178, 184 (1946) (upholding an exemption for small newspapers intended to put them “more on a parity with other small town enterprises”).

characteristics.”<sup>139</sup> Taking pains to emphasize “the inherent narrowness of our holding,” the Court concluded that “TikTok’s scale and susceptibility to foreign adversary control, together with the vast swaths of sensitive data the platform collects, justify differential treatment to address the Government’s national security concerns.”<sup>140</sup>

This explanation is not persuasive, however, because it fails to account for the other large platforms with Chinese ownership that collect user data. And more problematically, the Court could only conclude that the focus on TikTok was not a proxy for content-discrimination because it had *already* dismissed the relevance of the content manipulation rationale, for the unconvincing reasons discussed in the previous section. This dismissal looks even more questionable in light of the numerous precedents that suggest that speaker-based distinctions—particularly those that target a small number of speakers—should make judges *particularly* skeptical of governmental claims to be acting in a content-neutral manner. The targeting of TikTok should have provided *yet another* reason for the Court to pay special heed to the explicitly content-related reason that Congress passed PAFACAA. At the very least, this should have created a heavy burden on the government to rebut the usual presumption that the Court’s precedents would have it apply.

In an ordinary case, this would have been a hard presumption to rebut. In *Minneapolis Star*, the Court rejected the argument that imposing an ink and paper tax to the largest publications in the state could be justified by the fact that (as the state argued) “large publications . . . impose more social costs than do smaller publications.”<sup>141</sup> It held instead that singling out a few members of the press “present such a potential for abuse that no interest . . . can justify the scheme.”<sup>142</sup> The Court therefore seems to be suggesting that singling out particular speech platforms for disfavored treatment is almost never permissible.

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<sup>139</sup> *TikTok*, 604 U.S. at 73.

<sup>140</sup> *Id.*

<sup>141</sup> *Minneapolis Star & Trib. Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 592 (1983).

<sup>142</sup> *Id.*; see also *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936) (striking down a tax on advertising sales applicable to the largest newspapers in the state because it was “a deliberate and calculated device in the guise of a tax to limit the circulation of information to . . . the public”).

The Justices seemed to recognize the dangers during oral argument, when they discussed a hypothetical posed by Justice Alito and picked up by Justices Gorsuch and Barrett. Justice Alito asked the government to imagine a law that said “Joe can’t talk anymore. . . . [W]e don’t know what he’s going to say tomorrow or two weeks from now. . . . But whatever he says is bad because Joe is a bad person.”<sup>143</sup> He suggested that even though the law would not be targeting anything in particular Joe had said or might say, it was “hard” not to think of this as content- or viewpoint-based discrimination that would require strict scrutiny. And indeed, it *is* hard to imagine in any other circumstances the Court holding such a law didn’t require heightened First Amendment scrutiny, even if Joe had otherwise special characteristics, because the risk that it reflects an impermissible motivation on the government’s part is so great.

But somehow by the time they came to sign on to the *TikTok* opinion, these Justices proved untroubled by all these factors that would ordinarily demand searching review of the government’s actions in singling out a particular speaker. The per curiam opinion considered the government’s argument that TikTok deserved special treatment in isolation from all the contextual clues that evinced the Congressional concern about content, including the fact that TikTok is far from the only Chinese-owned platform that collects large amounts of user data. In doing so, the Court suggested that the government might be able to single out individual speakers, express concerns about the mix of content they disseminate, and *still* not have to satisfy heightened First Amendment scrutiny so long as the government could point to some other characteristic of the speaker in question that made them sufficiently special. Beware, any unique speaker in the public sphere.

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The *TikTok* per curiam opinion made three novel doctrinal moves that, if applied beyond the context of this case, would allow the government to side-step the safeguards of the First Amendment through simple formalities: first, by casting censorious laws as ownership restrictions; second, by invoking a content-neutral justification for a law to whitewash its content-based motivation; and third,

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<sup>143</sup> Transcript of Oral Argument at 140, *TikTok Inc. v. Garland*, 604 U.S. 56 (2025) (No. 24–656).

by targeting a speaker that it claims to be exceptional in some non-speech-related way.

Instead of exhibiting the “mistrust of governmental power” on which the First Amendment is typically premised,<sup>144</sup> in each of these moves the Court showed remarkable deference to the government, and a willingness to accept its word that the Court need not trouble itself with the content-related reasons why Congress sought to regulate TikTok. Indeed, the Court performed doctrinal gymnastics to avoid having to face head-on the conflict between the government’s national security claims and the obvious expressive interests of TikTok and its users implicated by the platform ban.

The question this raises is *why*. Why did the Court go to such lengths to minimize the First Amendment interests implicated by the case? Why did it produce an opinion that had to make so many novel doctrinal moves in order to uphold the law? Why did it work so hard to avoid reckoning with the law’s clear speech-related motivation and effects? Of course, we may never know. But the next Part suggests that we can understand *TikTok* better when we place it alongside other historical instances in which the Court condoned government speech suppression in the name of national security and which, with the benefit of hindsight, we can see were a product of fear.

### III. MAKING *TIKTOK v. GARLAND* ANTICANONICAL

It is ironic that the Court’s opinion in *TikTok* opens by expressing anxiety that the decision might “embarrass the future.”<sup>145</sup> The Court’s anxiety was focused on the difficulty of reckoning with “new technologies with transformative capabilities,” which is surely a difficult task for anyone, let alone Justices not selected for their technological expertise.<sup>146</sup> But there are many ways an opinion might embarrass the future. Indeed, it might be *more* embarrassing for an

<sup>144</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010) (“Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.”).

<sup>145</sup> *TikTok Inc. v. Garland*, 604 U.S. 56, 62 (2025) (quoting *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 300 (1944)).

<sup>146</sup> Oma Seddiq, *Supreme Court Justices Aren’t “the 9 Greatest Experts on the Internet,” Elena Kagan Said as They Heard a Major Tech Case*, BUS. INSIDER (Feb. 21, 2023), <https://www.businessinsider.com/supreme-court-google-tech-social-media-section-230-justices-internet-2023-2>.

opinion to err on a matter on which the Justices *are* supposed to be experts—the Court’s role in acting as a bulwark against the government’s efforts to suppress speech. Perhaps its anxiety about one kind of embarrassment led the Court to take its eye off another.

Because after the Court’s opinion in *TikTok*, the future came fast, and it was embarrassed. Just two days after the decision was handed down, the government chose to ignore both the Court’s decision and the law that it upheld. To be fair, this level of Executive branch non-execution of the law was unprecedented and could hardly be predicted by the Court.<sup>147</sup> But it embarrassed the Court nonetheless because the Executive ignoring PAFACAA, and Congress itself expressing little outrage about this fact, made a mockery of the government’s claims that the platform was a unique and urgent national security risk—and of the Court that took those claims at face value.

But the Court’s opinion was flawed even before all these events unfolded. The point of First Amendment doctrine is to avoid these ends by preventing these beginnings.<sup>148</sup> By removing the government’s power to suppress speech on the basis of its content except in the most limited circumstances, the First Amendment seeks to limit judicial temptation to bless speech repression that in retrospect is shown to be misguided and unnecessary, even if it might seem otherwise at the time. This is why the Court had to make such novel doctrinal moves in *TikTok*—because standard First Amendment doctrine would have made upholding the law much harder work. Taking the *Holder* path would have highlighted the Court’s usual responsibility to carefully scrutinize governmental attempts to suppress speech and would have placed a much higher burden on the government to justify its actions. Instead, the Court made novel doctrinal moves to suggest that this case was *different* from those ordinary First Amendment cases where the government is not allowed to simply claim that national security threats require censorship. This is also why the novel doctrinal moves the *TikTok* Court made should

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<sup>147</sup> Jack Goldsmith, *Trump’s Continuing Illegal Refusal to Enforce the TikTok Ban*, EXEC. FUNCTIONS (Jun. 19, 2025), <https://www.execfunctions.org/p/trumps-continuing-illegal-refusal> (“Trump’s moves extend far beyond non-enforcement and amount to a claim that the president has authority, at the flick of a pen, to destroy all consequences of a law enacted by Congress and upheld by the Supreme Court.”).

<sup>148</sup> *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

remain novel—because they create too many ways to evade the ordinary protections of the First Amendment.

*TikTok* itself contains hints that suggest some uneasiness and hesitancy among the Justices about its conclusions: the fact that it was an unsigned, per curiam opinion, reminders in the opinion itself about the case’s rushed timeline,<sup>149</sup> and repeated requests to read the case narrowly.<sup>150</sup> We should take the Court at its word and limit the case to its peculiar context and not repeat its mistakes. *TikTok* belongs in the anticanon of First Amendment law, lest it do even more damage to the First Amendment doctrinal architecture.

Arguing that *TikTok* is anticanonical is different from just arguing it is wrong. The argument is that *TikTok* is wrong in ways that hold important lessons. An anticanon is a set of cases that represent errors so grave that prevailing doctrine and the legal community must refute them to be legitimate.<sup>151</sup> As Jamal Greene has elegantly illustrated, because the purpose of the anticanon is pedagogical, cases become anticanonical not just because they err, but because they err in ways that might be repeated.<sup>152</sup> If there was no danger of the mistakes of an anticanonical precedent recurring—if it was too *simply* wrong—it would not provide interesting or useful lessons. Instead, we intone the events of the anticanon to remind ourselves of our fallibility, and to try to insulate ourselves from the errors of the past.

The First Amendment anticanon, or at least its core, is fairly easy to identify. It is comprised of those episodes in which the government violated the promise of the First Amendment, engaged in suppression of core political speech, and was not checked by the courts. Whatever else it might include, it surely includes the Sedition Act of 1798 penalizing “false, scandalous, or malicious writing” against the government, which was said to be necessary to strengthen the nation in its impending war with France, and under which dozens were indicted.<sup>153</sup> The Court has famously declared that “[a]lthough

<sup>149</sup> *TikTok*, 604 U.S. at 62 (“[C]autiousness is heightened in these cases, given the expedited time allowed for our consideration.”).

<sup>150</sup> *Id.* at 68 (2025) (calling *TikTok* a “unique case”); *Id.* at 73 (“[W]e emphasize the inherent narrowness of our holding”); *Id.* at 85 (Gorsuch, J., concurring) (“Given just a handful of days after oral argument to issue an opinion, I cannot profess the kind of certainty I would like to have about the arguments and record before us.”).

<sup>151</sup> Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011).

<sup>152</sup> *Id.* at 462–63.

<sup>153</sup> STONE, *supra* note 1, at 67.

the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”<sup>154</sup> And, as the introduction to this Article suggests, the anticanon also includes the Supreme Court cases that upheld convictions during World War I and the First Red Scare that produced the iconic opinions of Holmes and Brandeis. There are other very wrong First Amendment cases, but these are the examples teachers and judges consistently reach for. Whatever its particulars, the overall theme of the First Amendment anticanon is clear: speech suppression in the name of national security has left the largest stains on First Amendment history.

The role of the First Amendment anticanon therefore is to serve as a reminder that protecting speech that is said to be dangerous is hard and requires bravery, but that in the long run it is the only way to preserve expressive freedom. Generations of law students and judges have been weaned on the words of Justice Brandeis that the framers of the First Amendment knew that “fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.”<sup>155</sup> The anticanon is intended to stiffen spines in moments of fear.

This is the lesson that the *TikTok* Court seems to have forgotten. The weakness of the opinion’s novel doctrinal moves only highlights how difficult it is to distinguish this case from those historical errors. Justice Gorsuch wrote a concurrence which suggested that he, at least, was bothered by the echoes of the past. “As persuaded as I am of the wisdom of Justice Brandeis in *Whitney* and Justice Holmes in *Abrams*,” he wrote, “their cases are not ours. Speaking with and in favor of a foreign adversary is one thing. Allowing a foreign adversary to spy on Americans is another.”<sup>156</sup> But the previous two Parts have shown that, in fact, this case was very much about speech with and in favor of a foreign adversary, as much as it was about spying. The Court could not side-step the need to reckon with the First Amendment and its lessons so easily.

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<sup>154</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

<sup>155</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927).

<sup>156</sup> *TikTok Inc. v. Garland*, 604 U.S. 56, 85 (2025).

Finally, note that nothing in the argument above has rested on the idea that TikTok does not in fact present a national security risk. The government's perception of a threat might in fact be very real, as it was during World War I and the First and Second Red Scares. But the First Amendment only truly matters in the face of genuine fears, not imagined ones. For judges, it is no doubt hard to hold the line when the government makes dramatic national security claims. And it is surely harder when confronted with new technologies that suggest new possibilities and threats.<sup>157</sup> It might be a lot to ask Justices to hold steady when the government makes sensational claims about the dangers of a technology that seems foreign and opaque. But the First Amendment demands no less. In this way, *TikTok* adds a valuable lesson to the anticanon: the next *Abrams* won't look exactly like *Abrams*. Technology changes, but the need for vigilance remains the same.

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<sup>157</sup> Evelyn Douek & Genevieve Lakier, *Lochner.com?*, 138 HARV. L. REV. 100, 155 (2024) (“There is . . . a pattern—when faced with the unique technological features of platforms, and perhaps also, the complex politics that surround them, the Court hesitates.”).